In the Matter of

Matthew Stanley Quay

Before the Committee on Privileges and Elections of the Senate of the United States.

REPLY

To the Brief of Argument

in Support of Mr. Quay's Claim to a Seat

GEORGE WHARTON PEPPER
HAMPTON L. CARSON
GEORGE F. EDMUNDS
of Counsel

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BRIEF OF ARGUMENT

In support of Mr. Quay's Claim to a Seat.

Although Mr. Quay is the claimant in this case and the right of his counsel to begin and conclude the argument was recognized by the Committee, the brief submitted on his behalf was not accessible to counsel for the Memorialists when their brief was in course of preparation. The brief on behalf of the Memorialists, as submitted to the Committee and distributed to the members of the Senate, answers by anticipation most of the contentions made in support of Mr. Quay's claim. A brief review of all these contentions is now respectfully submitted.

The printed argument on behalf of Mr. Quay consists of seven propositions. It is proposed to cite these propositions in order and then to indicate briefly the reasons why they are, in some instances, unsound, and why, in others, they have no application to this case.

I.

"A vacancy 'happens' when it 'happens to exist' within the meaning of the Constitution, so that an Executive appointment may be made until the next meeting of the Legislature; in other words, a vacancy that 'happens' or 'occurs,' or 'takes place' during the session of a Legislature, but 'continues to exist' after the Legislature has adjourned, 'happens' within the meaning of the Constitution and may be temporarily filled by Executive appointment."

When the Federal Convention was framing the section of the Constitution which deals with the election and qualifications of Senators, the Committee of Detail reported the following provision to the Convention: "*The Senate of the United States shall be chosen by the legislatures of the several states. Each legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the legislature. Each member shall have one vote.*"

That portion of the report of the Committee which provided for the supplying of vacancies by the State Executive was debated and an objection was made to vacancies in the Senate being supplied by the Executives of the States. Mr. Ellsworth (acting in this matter as in others under the inspiration of Roger Sherman) contended for this grant of power to the Executive as being of vital importance to the smaller States. A compromise was finally effected, and the constitutional provision in its present form was adopted as follows: "*The Senate of the United States shall be composed of two senators from each State, chosen by the Legislature thereof, for six years; and each*

Senator shall have one vote. Immediately after they shall be assembled in consequence of the first Election, they shall be divided as equally as may be into three classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the expiration of the fourth Year, and of the third Class at the expiration of the sixth Year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next Meeting of the Legislature, which shall then fill such vacancies.

Thus it will be seen that the power of appointment in any condition of vacancy was vested in the Governor by the report of the Committee; but the Convention struck out that provision and substituted the words "if vacancies happen by resignation or otherwise during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies."

The contention made in support of Mr. Quay would (upon the point under consideration) be sufficiently sound if the report of the Committee of Detail had been adopted by the Convention. In point of fact, however, the language of the Committee was modified by the Convention in such a way as to

exclude in advance the contention which is now made on Mr. Quay's behalf.

So far as the question involved is one of interpretation of language, the subject is dealt with at length at page 8 of the brief already submitted.

The argument based upon the analogy of presidential appointments is answered on page 9 of our brief. In this connection it may be pointed out that if the Senate of the United States construes the provision under consideration as some of the Presidents and their Attorneys General have construed clause 3 of section 2 of Article II relating to Executive appoint ments, the Senate will for the first time give its approval to a presidential claim of right which a majority of the Senate have always disputed, and will in effect be relinquishing to the President an important part of the responsibility vested in the Senate by the Constitution.

II.

"The Constitutional provision 'If vacancies happen by resignation or otherwise during the recess of the Legislature, applies broadly to every vacancy in the office of United States Senator that continues to exist from any reason whatever after the Legislature has adjourned."

This proposition is a re-statement of the first. Its principal application is to the question of the existence of the executive right of appointment where the vacancy is caused by the expiration of a prior term. The argument in behalf of Mr. Quay ignores the important distinction between the happening of a vacancy through the expiration of a prior term *where the vacancy could be foreseen and provided against* and the happening of a vacancy *which could not be foreseen or (if foreseen) could not be provided against.* In point of fact, no man has taken his seat as Senator under an executive appointment since 1817 where the vacancy was caused by the expiration of a prior term which could be foreseen and provided against. In Sevier's Case the Legislature did not anticipate the occurrence of the vacancy, which was caused by the drawing of lots for a short term. In the Bell Case and in the Blair Case, the Legislature which had last assembled was not the Legislature (owing to the adoption of a new State constitution) which under the act of Congress had the authority to elect a Senator. In all three cases the Governor's appointee was of course seated—*it being the crucial fact in each case that the vacancy occurred in recess and that no Legislature had been in session after a vacancy began.* It is therefore difficult to perceive how the incomplete quotations from remarks made by Senators in discussing the Bell

Case can help Mr. Elkin's position. In that case, the vacancy *occurred in recess.* In Mr. Quay's case the vacancy occurred *while the Legislature was in session.* In the Bell Case, the Legislature, although it foresaw the vacancy, was not authorized by law to fill it. In the Bell Case there had never been a time up to the moment when Mr. Bell presented his credentials in which any Legislature had an opportunity to fill the vacancy which occasioned his appointment. In Mr. Quay's case, the Legislature had such an opportunity for weeks and months before the vacancy occurred *and for a period of forty-seven days thereafter.* How is it possible to refer to the Bell and to the Blair Cases except as the strongest possible illustrations of the contrast between a situation in which the Governor has a right to appoint and a situation like that in the Quay case in which the Governor has no such right?

The case of *State* vs. *Askew*, 48 Ark., '89, relied on furnishes no authority for the contention claimed. The language of the Constitution was (Art. VII, Sec. 50): "All vacancies occurring in any office * * * shall be filled by appointment by the Governor." The Constitution made no limitation as to when or how the vacancy should occur.

The case cited by Mr. Elkin on page 17 of his brief (*Stocking* vs. *The State*, 7 Ind., 329) furnishes no support to the contention of Mr. Elkin. The Indiana Constitution (Art. V, Sec. 18) declared that "When at any time a vacancy *shall have* occurred * * * the Governor shall fill such vacancy by appointment. * * *"

The case of *Walsh* vs. *Commonwealth* ('89 Pa. State, 425) furnishes no support to the contention of

the brief. The Constitution of Pennsylvania provided (Art. IV, Sec. 8) that the Governor "shall have power to fill all vacancies that may happen in offices to which he may appoint during the recess of the Senate. * * *" And further provided, "If the vacancy shall happen during the session of the Senate the Governor shall nominate to the Senate before their final adjournment a proper person to fill said vacancy." It further provided that in the case of any vacancy in an elective office a person should be chosen at the next general election unless the vacancy shall happen within three months preceding the time of such election. The case of Walsh turned entirely upon the question of *whether there was a vacancy at all* within the meaning of the Governor's power, when the Legislature had, in the spring, passed an Act establishing a new county, contingent upon a vote of the people to be thereafter taken and that vote had been taken during a recess of the Legislature and the county had thereby come into existence. *It was held that the vacancy had come into existence during a recess of the Senate within the language of the Constitution.* No question arose in respect of the time when the vacancy happened, but the sole question was as to whether a newly created office unfilled was vacant.

We think it may be safely stated that there is no case decided by any Court (excepting that decided by Justice Woods) which holds that, when a constitution or law provides that a vacancy happening during a particular period of time *may* be supplied temporarily by an executive appointment, the appointing power can be exercised when the vacancy did not begin during that period.

III.

"The words 'By resignation or otherwise' are not words of limitation indicating the kind of vacancy intended to be filled by Executive appointment, but are used in a broad and comprehensive sense indicating, first, by the use of the word 'resignation,' that the members of the Senate could resign as contra-distinguished from members of the English Parliament, who could not resign, and, second, by the use of the word 'otherwise' that vacancies created in every other way, including vacancies by resignation, may be temporarily filled under the authority of the Governor to appoint."

Let it be assumed, solely for the moment, that both branches of the above proposition are true. It will then be perceived that neither branch has anything to do with the case of Mr. Quay. Mr. Quay did not resign, and therefore no question of resignation is here involved. If the term "otherwise" is broad enough to include the happening of vacancies by the expiration of a prior term, the only conclusion which can be drawn is that the Senate of the United States made an erroneous decision in the Mantle Case and in the Corbett Case. The conclusion does not touch the case of Mr. Quay, which stands distinct from all the others in that in his case *the vacancy occurred during a session*, while in the other cases it occurred in recess ; and in his case *the Legislature had an opportunity to act after the vacancy had occurred*, while in the other cases it had no such opportunity. In other words, if counsel for Mr. Quay were to overthrow the solemn decisions of the Senate in the two cases cited and were to succeed in establishing the proposition under discussion, he would be making no progress in

the direction of validating Mr. Quay's claim, because in Quay's case the governing facts are different, and different principles are involved.

Again it will be perceived, in view of the distinctions pointed out above, that the argument for Mr. Quay goes far beyond parallel and analogy in seeking to press into service extracts from arguments made in the Bell Case, the Mantle Case and the Corbett Case. Indeed, it is proper to call attention to the fact that while every Senator who voted against Mr. Corbett should, on principle, vote against Mr. Quay; yet many of those who voted to seat Mr. Corbett may with perfect consistency take a position adverse to Mr. Quay's claim; for in the Corbett Case *principles* were not in dispute, but Senators divided largely on a question of *fact* as to whether there had been a legislative opportunity to provide for the vacancy thereafter to occur. There was strong reason in the contention of those who voted for Corbett to the effect that there had been no opportunity for legislative action, and therefore that the case was similar to the cases of Blair and Bell. In Mr. Quay's case the issue is not an issue of fact. The facts are undisputed. It is a question to be decided purely upon principle and upon senatorial authority, and we submit that both require the rejection of his claim.

IV.

"The clear intention of the framers of the Constitution, as shown by the power to temporarily fill existing vacancies by Executive appointment, was that representation in the Senate should always be kept as nearly full as possible."

This proposition is not entirely clear. If it means that the framers intended that representation in the Senate should always be kept as nearly full as possible consistently with the plain mandate of the Constitution as to the way in which Senators shall be chosen—then the proposition is a truism and is wholly unobjectionable. If it means that the framers intended that senatorial vacancies should always be filled in accordance with the Constitution of the United States when that is practicable, but that, when a constitutional method is impracticable, the vacancies should be filled otherwise than as the Constitution directs—it is a proposition that is obviously unsound and carries with it its own refutation. In other words, it does not advance the discussion of Mr. Quay's claim to a seat to assert that the representation from the State of Pennsylvania must always be kept full. That is merely another way of saying that he is entitled to the seat. But this is the very question that is before the Senate for decision, and it cannot be set at rest by the assertion of a conclusion.

It has been shown in the brief heretofore filed that the executive right of appointment was a provision intended to secure to the States the right to be represented at all times in the Senate (pages 4–6). In order to avail themselves of that right, the Constitution provides that the State Legislatures are to elect the

Senators. If the Legislature has an opportunity to elect and does not take advantage of it, such failure to elect is not a matter with which the Constitution of the United States concerns itself. If, indeed, the Legislature *has had no opportunity to act*, then the Constitution takes care that the State shall have its opportunity by giving to the Governor the right to make a temporary appointment if he deems it expedient. It has been pointed out (pages 13 and 14 of former brief) that it is optional with the Governor whether to appoint or not. The Legislature may fail to elect and the Governor may think it unwise to appoint. This actually happened in Pennsylvania in the case of William Bigler in 1855. If the theory of the framers was that under all circumstances the Senate should be kept full, they would have adopted the report of the Committee of Detail instead of rejecting it by the adoption of a decidedly different clause; and they would have made it mandatory upon the Governor to act, instead of leaving it optional with him. No one has been bold enough to argue that "may" here means "shall," in view of the remarks of Mr. Ellsworth cited at page 6 of the former brief.

We earnestly request the Senate to consider the effect of giving to the Governor of a State a direct inducement to prevent the Legislature from filling a vacancy (see page 14 of former brief). No more vicious application of the proposition under consideration can be conceived of than one which would result in thus keeping the Senate full at the expense of constitutional principles.

V.

"The Constitutional provision which authorizes the Governor to make temporary appointments applies to all vacancies that may exist during a recess, regardless of whether a Legislative session, either in whole or in part, has intervened since the vacancy occurred. The vacancy exists whether a session of the Legislature intervened or not, and there is no sufficient reason why it should not be temporarily filled by Executive appointment."

To maintain this proposition, counsel for Mr. Quay must show that what Attorney General Wirt regarded as "the literal sense and natural import" of the phrase, "If vacancies happen during the recess," is in fact not its true meaning. He must then show that the solemn decision of the Senate in the case of Kensey Johns (decided in 1794; Taft, page 1) was erroneous, although Ellsworth, the champion of the executive power, was a member of the committee which reported adversely to the claimant's right, and voted with the majority in refusing to seat him. He must next show that the case of John B. Allen was unjustly dealt with by the Senate in 1893. He must next meet and overcome the argument that it is unwise to recognize the right of a Governor in a matter affecting *the right of Senators to their seats*, under constitutional language which has always led the Senate to deny the presidential right of appointment in cases merely affecting *the discharge of a senatorial duty*. Finally, he must induce the Senate to overrule its solemn decisions in the Mantle and Corbett Cases; for to hold that a Governor may appoint where the Legislature has been in session since the occurrence

of a vacancy necessarily involves the position that the Governor may appoint where the opportunity for legislative action occurred before the vacancy happened.

In the brief submitted on Mr. Quay's behalf, no serious attempt is made to discharge this burden of proof, except by an appeal to three different precedents. One is the series of opinions by Attorneys General; as to which see page 9 of the former brief. The second includes a decision of the Attorney General of Pennsylvania in the case of a Factory Inspector; a decision of the Supreme Court of Rhode Island and a decision of the Supreme Court of Oregon. These authorities are not in point, as appears from the following considerations:

1. The decision of the Attorney General of Pennsylvania is inapplicable for the simple reason that Section 5 of the Act of May 20, 1889 (P. L. 243, and not P. L. 248 as cited) made it the duty of the Governor, "immediately after the passage of this act," to appoint, with the advice and consent of the Senate, a Factory Inspector. It was, therefore, the case of the creation of a new office, *the act being silent as to the time of the happening of the vacancy.* It being the duty of the Governor to act, it was held that the inaction of the subordinate body, the State Senate, should not be permitted to defeat the will of the people.

2. The Rhode Island case (*In re* the Representation Vacancy, 15 R. I., 621) merely decides that where the Rhode Island Assembly had declared Pirce elected to the National House of Representatives, and the latter body had rejected him, a vacancy had happened under such circumstances that the Governor had power to issue a writ of election to fill the vacancy. It is

proper at this point to contrast the language of Article 1, Section 2 of the Constitution of the United States with the language of Section 3 of the same article. The fourth paragraph of Section 2 is as follows:

"*When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.*"

It will be noted that this provision is silent as to the time of the happening of vacancies. The people of the Commonwealth are always in session and need only to be called upon to fill the vacancy, whenever and however the vacancy may have occurred.

Contrast with this provision the language of Section 3, which is as follows:

"**The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; * * * And if vacancies happen by resignation or otherwise during the recess of the Legislature of any State the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.**"

It will be seen, therefore, that in the case of the House only one question is to be asked; namely, Has a vacancy happened? If the answer is affirmative, the Governor issues a writ of election. This is all that is decided by the Rhode Island case cited by Mr. Elkin. In the case of the Senate, on the other hand, the express language of the Constitution requires that two questions shall be asked; namely, (1) Has a vacancy happened? and, if the answer is affirmative, then (2)

When did it happen? If it happened while the Legislature was in session, it is not a case in which the executive authority can act. If it happened when the Legislature was not in session, it is a possibility that the Legislature had an opportunity to provide for it in advance or an opportunity to fill it after it occurred. In the former event, precedent has now settled it (departing from a view at one time entertained) that the Governor has no rights. In the latter event, the fact is that there has never been a time in the history of the Government when the claim of a Governor's appointee has been recognized. In short, in the case of the Senate as distinguished from the case of the House, the Governor has no power except when the vacancy happened at such a time that neither before nor since its occurrence has the Legislature had an opportunity to fill it.

It thus appears that the Rhode Island case, dealing as it does with the provision relating to the House, has not even a remote application to the question under discussion. We have been unable to find the Oregon case cited by Mr. Elkin as *State* vs. *Johns*, 2 Oregon, 507. Search has been made through all the Oregon reports, and no case of that name has been found except one in 15th Oregon, 27, which deals with a question of criminal law.

3. The third authority appealed to by Mr. Elkin is an extract, shorn of its context, from the remarks of a Senator in the discussion of the Bell Case. *Again we call attention to the fact that in the Bell Case the vacancy occurred in a recess of the Legislature; in the Quay case it occurred in session. In the Bell Case the Legislature did not sit in the interval between the occur-*

rence of the vacancy and the date of the appointment; in the Quay case it sat for forty-seven days. What useful purpose is subserved by an attempt to show that one who advocated the seating of Mr. Bell ought, on principle, to advocate the seating of Mr. Quay? The crucial facts in the two cases are different, one claim being supported by the Constitution and the other being asserted in the teeth of it.

VI.

"The Federal Constitution is the supreme law of the land and the paramount authority in all matters touching the rights of individual citizens and the duties of Federal, State and all other public officers."

The validity of this proposition is not open to question. We do not for a moment contend that a provision of the Constitution of Pennsylvania can in the smallest degree limit or restrain the operation of the Constitution of the United States. It will be perceived, however, that the Constitution of the United States authorizes executive appointments in case of vacancies happening "during the recess of the Legislature" of any State, but it does not undertake to regulate the sessions of State Legislatures or to determine when they shall sit or when they shall be in recess. On the contrary, the Constitution of the United States expressly authorizes each State to regulate the time of electing Senators and Representatives, subject to the power of Congress to alter such regulations. The people of Pennsylvania, therefore, have the right to determine how often their Legislature shall meet and the occasions upon which it shall be called together. In the Constitution of Pennsylvania the people of that Commonwealth have exercised their right by providing that, in case of a vacancy in the office of United States Senator in a recess between sessions, the recess shall be promptly brought to an end and the Legislature assembled by the call of the Governor for the purpose of discharging the duty laid upon the Legislature by the Consti-

tution of the United States. The exact language of the Constitution of Pennsylvania is cited and its significance discussed under Proposition VII (*infra*). Suffice it to say at this point that the Constitution of Pennsylvania, so far from being in conflict with the Constitution of the United States, is so framed upon this point as to be ancillary to the National Constitution, in that it provides the machinery for accomplishing the purpose which that instrument has in view.

VII.

"The provision of the Pennsylvania State Constitution in reference to the calling of an extra session of the Legislature to fill a vacancy in the office of United States Senator does not abrogate or annul the provisions of the Federal Constitution under which the Executive makes temporary appointments to fill vacancies."

This proposition we heartily endorse. The provision of the Constitution of Pennsylvania does *not* abrogate or annul the provisions of the Federal Constitution nor does it conflict with them, but is supportive of and ancillary to them, as explained under Proposition VI. The provision of the Constitution of Pennsylvania is as follows: "*The General Assembly shall meet at twelve o'clock noon, on the first Tuesday of January every second year, and at other times when convened by the Governor, but shall hold no adjourned annual session after the year one thousand eight hundred and seventy-eight.* In case of a vacancy in the office of United States Senator from this Commonwealth, in a recess between sessions, the Governor shall convene the two Houses by proclamation or notice not exceeding sixty days, to fill the same."

Under the first branch of the above provision the Governor is authorized to convene the Legislature whenever he thinks proper. It is purely a discretion vested in him, and is not reviewable otherwise than by impeachment. To this branch of the provision the authorities cited by Mr. Elkin are applicable. Then immediately follow the words to which those authori-

ties have no application: "*In case of a vacancy in the office of United States Senator from this Commonwealth, in a recess between sessions,* **the Governor shall convene the two houses, by proclamation on notice not exceeding sixty days, to fill the same.**" Thus, in the first branch of the paragraph, a *power* is given to the Governor to convene the Legislature in his discretion. In the second branch, which is absolutely useless unless mandatory, he is *commanded* to do it on a short notice and for the special purpose in question. The clause does not speak of a vacancy that may "happen" in a recess, but it speaks of the *existence* of a vacancy, whatever its cause or time of origin. If the case were one in which the Governor had the power of *appointment*, he could *appoint—not fill*—until the next meeting of the Legislature, which the Constitution had commanded him in every case of vacancy to assemble on *not more* than sixty days' notice. When the condition of vacancy existed in recess his duty attached. He was given no such discretion as he was given in the preceding lines of the section. The contrast is as complete as language could make it. The command was attached to the event, and, therefore, the duty to issue the proclamation for assembling the Legislature was an *immediate* duty to be performed as soon as possible.

The people in their fundamental law have said: "We will have no Governor's favorite or Governor's creator representing us in the Senate at his mere will, for more than sixty days." In this case, therefore, the Governor's commission would have expired long ago, or if not, it would have been because the Legislature he was commanded to convene still continued to sit

without having chosen a Senator. The claim of right under the Governor's commission is now, therefore, a bald demand that the Senate shall approve and confirm an usurped and forbidden power.

It was suggested at the hearing that the Governor might have thought that a called session would be in the same deadlock that had existed before. It is submitted that such a consideration was not his affair at all. His *duty* did not depend on *his* view of what might happen or not happen in the proceedings of the independent body having primary authority. If it can be imagined that he had such fears, it may better and with greater probability be thought that he refused to convene the Legislature because he feared that his favorite would fail and another person be chosen.

It is submitted that the propositions relied upon by counsel for Mr. Quay have now been fairly answered and disposed of in their relation to this case. At the end of the brief submitted on behalf of Mr. Quay references to the Senate precedents have been collected, but no great stress is laid upon them—for the obvious reason that they establish principles utterly inconsistent with Mr. Quay's claim to a seat. Reference is indeed made to the fact that since the adoption of the Federal Constitution there have been 156 executive appointments to fill vacancies in the Senate. No reference, however, is made to the much more important fact that in no case in the entire list has the Senate seated a Governor's appointee where the vacancy occurred while the Legislature was in session; that in no case has such an appointee been seated when the Legisla-

ture had an opportunity to fill the vacancy between its occurrence and the date of the appointment; and that in no case since 1817 has an appointee been seated if the Legislature had an opportunity to provide for the vacancy before the date of its occurrence.

In connection with the statement in the appendix to Mr. Elkin's brief that the precedents of the Senate are not uniform upon the question under consideration, we respectfully beg to refer to our brief heretofore filed, containing (at page 16) a discussion of the Senate precedents and at its end a tabular analytical statement of the contested cases decided by the Senate since 1789. We submit that the conclusions which have been reached upon principle are abundantly sustained by senatorial authority, and that both upon principle and authority the claim of Mr. Quay should be rejected by the Senate.

GEORGE WHARTON PEPPER,
HAMPTON L. CARSON,
GEORGE F. EDMUNDS.

Note by Mr. Edmunds.

I have not, down to this time, had the opportunity to see the report of Mr. Elkin's oral argument before the Committee in which he read selected extracts from the reports (never revised) of my remarks in the Bell and Blair Cases. If those extracts are of the least interest to the Committee or the Senate, I beg to ask that the whole of what I said may be read. It will then appear that my present position is absolutely consistent with what I then contended, namely :

1. That the vacancy must happen—*begin*—in the recess of the Legislature. This was the fact in the Bell and Blair Cases. It was not the fact in this case.

2. That when a Legislature had sat after a vacancy began the Governor could not lawfully appoint.

3. That the Senate ought to be kept full by *constitutional means ;* and so, as the letter of the Constitution named, as I thought, any vacancy beginning in a recess when no Legislature could fill it, the Governor had the right to appoint. And I also said that the Senate, for its own honor, ought to stand by its previous solemn and deliberate decisions.

GEORGE F. EDMUNDS.

GEORGE H BUCHANAN & COMPANY
420 SANSOM STREET 420
PHILADELPHIA